

**DISTRICT OF COLUMBIA**  
**DOH Office of Adjudication and Hearings**  
825 North Capitol Street N.E., Suite 5100  
Washington D.C. 20002

DISTRICT OF COLUMBIA  
DEPARTMENT OF HEALTH  
Petitioner,

v.

JAMES A. DUNCAN  
Respondent

Case No.: I-00-40131

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**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER**

**I. Introduction**

On June 26, 2000, the Government served a Notice of Infraction upon Respondent James A. Duncan, alleging that he violated D.C. Code § 2-3305.1 by practicing psychology without a license. The Notice of Infraction sought a fine of \$500.00 for the violation. Respondent filed a timely plea of Deny on July 11, 2000, and I held an evidentiary hearing on August 4, 2000. Carmen Johnson, Esq. represented the Government, and Respondent appeared *pro se*.

Based upon the testimony in the record, my evaluation of the credibility of the witnesses and the documents admitted into evidence, I now make the following findings of fact and conclusions of law.

## II. Findings of Fact

Respondent James A. Duncan received a doctorate in Psychology from Howard University in 1997. Petitioner's Exhibit ("PX") 101 at 1. At the time of the hearing, Dr. Duncan was employed by National Children's Center, Inc. ("NCC") as a psychologist, providing services to the residents of a group home for mentally retarded persons. At the time, Dr. Duncan was not licensed to practice psychology in the District of Columbia.

Dr. Duncan provided a number of different services to residents of the group home, including "behavior management techniques, individual and group therapy, . . . [and] parent and family therapy." PX 101 at 1. He also used the title "psychologist", both within the group home and during meetings with persons outside the group home, *e.g.*, with a resident's school. PX 100, 102, 103. NCC's description of his position states that he "[p]rovides a range of psychological services to people living in the Residential Services Program." PX-105.

Dr. Duncan hoped that his work at NCC would help him to satisfy the statutory requirement that an applicant for a psychologist's license must complete at least two years of post-doctoral experience. D.C. Code § 2-3305.4(o)(2). In November or December 1999, officials at NCC told him that he needed to send a letter to the Board of Psychology informing the Board of his work there and of his supervision by Dr. Lisa Slade, a licensed psychologist employed by NCC. NCC had prepared such a letter and Dr. Duncan signed it. Dr. Duncan knew that Dr. Slade also was required to send a similar letter to the Board, informing it that she was supervising him. He understood that Dr. Slade had signed such a letter, and officials at NCC

assured him that they would mail both letters to the Board of Psychology. Dr. Duncan did not keep a copy of the letter that he signed, and never saw a copy of any letter addressed to the Board by Dr. Slade. It is undisputed that the Board of Psychology did not receive a letter from either Dr. Duncan or Dr. Slade informing it that Dr. Duncan was working under Dr. Slade's supervision at NCC.

In May 2000, Semret Tesfaye, the inspector who issued the Notice of Infraction, conducted a recertification inspection at NCC's group home at 200 Rittenhouse Street, N.W., and discovered that Dr. Duncan did not hold a license to practice psychology. After she brought Dr. Duncan's unlicensed status to NCC's attention, Dr. Duncan checked with the Board of Psychology and discovered that neither the letter he signed in December 1999 nor any letter from Dr. Slade about his work there was on file with the Board. He then signed another letter to the Board of Psychology and had Dr. Slade sign another one on behalf of NCC, and sent them to the Board. Respondent's Exhibits ("RX") 202, 203.

On July 25, 2000, Dr. Duncan applied for a license to practice psychology, having completed the necessary amount of post-doctoral experience. PX-104.

### III. Conclusions of Law

#### A. Did Dr. Duncan Practice Psychology?

The Health Occupations Revision Act of 1985 (“HORA”) defines “practice of psychology” in very broad terms:

“Practice of psychology” means [1] the application of established scientific methods and principles, including the principles of psychophysiology, learning, perception, motivation, emotions, organizational and social behaviors[,] for the purpose of understanding, assessing, treating, explaining, predicting, preventing, or influencing behavior; [2] the application of psychological methods and procedures for interviewing, counseling, psychotherapy, including behavior therapy, behavior modification, behavior medicine, or hypnotherapy; or [3] the application of psychological methods or procedures for constructing, administering or interpreting tests of intelligence, mental abilities and disorders, neuropsychological functioning, aptitudes, interests, attitudes, personality characteristics, emotions, or motivations.

D.C. Code § 2-3301.2 (16) (A).

Dr. Duncan concedes that his activities at NCC satisfy that definition, and the evidence supports that concession. By offering individual and group therapy, as well as parent and family therapy, Dr. Duncan was using “established scientific methods and principles” for “treating” or “influencing” behavior. Moreover, it is clear from the position description (PX-105) that NCC’s primary purpose in hiring him was for his expertise in the use of those principles for the purposes identified in the statute. Dr. Duncan, therefore, satisfies the first element of the definition. *See DOH v. Heaton*, No. I-00-40058 Final Order at 12-14 (January 24, 2001) (first element of the definition is satisfied if an individual’s primary function is the use of established scientific methods and principles for one of the purposes listed in the definition; incidental use of

psychological methods and principles to achieve some other goal is not covered). Dr. Duncan's offering of individual therapy also satisfies the second element of the definition, as he employed psychological methods and procedures in the course of interviewing or counseling residents of the group homes, with the expectation that those methods and procedures would have a therapeutic effect. *Id.* at 15-18.<sup>1</sup>

**B. Was Dr. Duncan's Unlicensed Practice Authorized?**

Although Dr. Duncan's activities at NCC satisfy the statutory definition of "practice of psychology," he contends that 17 DCMR 6911 permitted him to do so without a license. The Government takes issue with that argument on three grounds. First, it argues that § 6911 does not authorize an unlicensed person to practice psychology. Second, it argues that no regulation could authorize the unlicensed practice of psychology, in light of the statutory prohibitions against such practice. Finally, the Government contends that, even if § 6911 validly authorizes the unlicensed practice of psychology in certain instances, Dr. Duncan did not satisfy the requirements of the rule. I address each argument separately below.

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<sup>1</sup> Although he provided services in a group home for mentally retarded persons, the therapy that Dr. Duncan offered did not constitute the design of either a behavior treatment program or a regular review of an individual habilitation plan. Therefore, the safe harbor established by 22 DCMR 3521.12 is not available to him. *Compare Heaton, supra*, at 27-34.

## 1. The Scope of § 6911

By its terms, § 6911 permits unlicensed students or graduates to practice psychology.

The first subsection of the rule states:

A student or graduate *may practice psychology* only under the general or immediate supervision of a psychologist, psychiatrist or independent clinical social worker licensed in the District under the Act and in accordance with this section.

17 DCMR 6911.1 (Emphasis added).

Plainly, the rule authorizes a “student or graduate” to “practice psychology,” *i.e.*, to do anything encompassed within the statutory definition of “practice of psychology,” provided that the student or graduate is supervised and fulfills the other requirements of § 6911.<sup>2</sup> At the hearing, the Government argued that the rule does not authorize the student or graduate to do anything that a licensed psychologist may do, but it was unable to articulate a limiting construction of the term “may practice psychology”, as used in the rule. No limitation is apparent in those words and they must be enforced according to their plain meaning. *In re Estate of James*, 743 A.2d 224, 227-228 (D.C. 2000). Thus, the rule provides that persons who satisfy its requirements may practice psychology without a license.<sup>3</sup>

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<sup>2</sup> Although the rule does not contain a definition of “graduate,” the meaning of that term can be inferred by contrasting it with the definition of “student.” The rule defines a student as an individual enrolled in a doctoral program in psychology. 17 DCMR 6911.12. It follows, therefore, that a “graduate” is someone who has successfully completed such a program. Accordingly, Dr. Duncan qualifies as a “graduate” within the meaning of § 6911.

<sup>3</sup> It should be emphasized that § 6911 authorizes practice *only* by graduates and students who are supervised in accordance with the rule’s definitions of “general supervision” and “immediate supervision”, 17 DCMR 6999, and who comply with the other requirements of § 6911. It is not a general authorization permitting all graduates or students to practice.

## 2. The Validity of § 6911

Section 6911 allows graduates to practice psychology if they are fulfilling the post-doctoral experience requirements of D.C. Code § 2-3305.4(o) or if they have an initial application for a license pending with the Board. 17 DCMR 6911.2(c). The Government argues, however, that, to the extent it permits unlicensed graduates to practice in order to fulfill the post-doctoral experience requirements, the rule is invalid because it contravenes the statutory requirement that “[a] license . . . is required to practice . . . psychology . . . in the District, except as provided in this chapter [*i.e.*, the Health Occupations Revision Act].” D.C. Code § 2-3305.1. *See also* D.C. Code § 2-3310.1: “No person shall practice . . . a health occupation licensed or regulated under this chapter in the District unless currently licensed, or exempted from licensing, under this chapter.”<sup>4</sup>

Section 6911 was promulgated by the Department of Consumer and Regulatory Affairs (“DCRA”) in 1988. 35 D.C. Reg. 2921 (April 22, 1988). The Director of DCRA had been delegated the Mayor’s authority under D.C. Code § 2-3303.2 (14) to issue “all rules necessary to

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<sup>4</sup> The portion of § 6911.2(c) that allows graduates to practice psychology while an initial application for a license is pending implements a specific provision of HORA. D.C. Code § 2-3301.3(e) permits “an individual who has filed an initial application for licensure in [any] health occupation and is awaiting action on that initial application” to practice under the supervision of a licensed health professional and authorizes the promulgation of implementing rules. Such practice, therefore, is expressly authorized by HORA and would not violate the statute’s requirement that an individual possess a license “except as provided in this chapter.”

implement the provisions of this chapter.”<sup>5</sup> Section 6911, therefore, is valid if it is “necessary to implement” any of the provisions of the HORA.

As already noted, in order to be licensed in the District of Columbia, a psychologist must have two years of post-doctoral experience. D.C. Code § 2-3305.4(o)(2). Section 6911 implements that requirement by permitting graduates to obtain such experience in the District of Columbia. Accepting the Government’s argument would require all applicants for a psychologist’s license to obtain their post-doctoral experience elsewhere. It is far from clear that the Council that passed the HORA intended that result. The District of Columbia enjoys an obvious advantage if newly-licensed psychologists have prior experience serving local citizens and institutions. Moreover, allowing graduates to obtain their post-doctoral experience within the District is likely to increase the pool of qualified applicants, as applicants who obtain their experience here are more likely to remain here. For these reasons, DCRA reasonably concluded that allowing holders of doctoral degrees to practice in the District of Columbia under supervision in order to gain the experience necessary for licensure was “necessary to implement” the statutory experience requirements. Section 6911, therefore, is authorized by D.C. Code § 2-3302.2(14). *Hotel Tabard Inn v. District of Columbia Department of Consumer & Regulatory Affairs*, 747 A.2d 1168, 1174 (D.C. 2000) (deference should be given to agency’s reasonable interpretation of a statute it administers); *Kalorama Heights Limited Partnership v. District of Columbia Department of Consumer & Regulatory Affairs*, 655 A.2d 865, 868 (D.C. 1995) (agency’s interpretation of statute it administers will be sustained when reasonable).

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<sup>5</sup> That authority subsequently was transferred to the Director of the Department of Health, pursuant to Mayor’s Order 98-140, 45 D.C. Reg 6593 (August 20, 1998).



### **3. Did Dr. Duncan Comply With § 6911?**

In order to be eligible to practice pursuant to § 6911, a graduate must inform the Board of Psychology in writing of the name of his or her supervisor, the expected period of supervision, and the nature and location of the graduate's practice. 17 DCMR 6911.5. The graduate's supervisor also must inform the Board of Psychology that he or she is supervising the graduate, and must inform the Board of the expected period of supervision and the nature and location of the graduate's practice. 17 DCMR 6911.4. Dr. Duncan signed a letter containing the necessary information in December 1999, as did Dr. Slade. The Board, however, never received those letters. Because the rules require the graduate and the supervisor to "inform" the Board of the graduate's activities, the letters signed by Dr. Duncan and his supervisor had to be received by the Board in order to be effective. Because they were not, Dr. Duncan's practice was not authorized by § 6911. Consequently, he violated the prohibition against unlicensed practice of psychology found in D.C. Code § 2-3305.1.

### **C. The Appropriate Fine**

A civil fine of \$500.00 is authorized for violations of § 2-3305.1. *See* 16 DCMR 3212.1(k). Several factors indicate that a reduction in that amount is appropriate. Dr. Duncan's violation of the statute was not intentional. In fact, he attempted in good faith to comply. He signed a letter containing the required information and relied upon his employer's promise to mail it, along with the required letter from his supervisor. When he discovered that the Board of Psychology did not receive the letters, he promptly corrected the violation by forwarding the

necessary information to the Board. The Government does not contend, and did not prove, that Dr. Duncan did not receive the level of supervision required by § 6911, nor is there any evidence that the services he offered were substandard in any way.

Dr. Duncan, however, was not diligent in ensuring that NCC sent the required documents to the Board of Psychology, and that the Board received them. He never asked for copies of the letters and never followed up, either with NCC or the Board, to ensure that the letters had been received, even though he knew that his authority to practice psychology depended upon the Board's receipt of the letters. Section 6911 imposes a large portion of the responsibility for communicating with the Board upon the graduate who wishes to practice according to its terms.<sup>6</sup> It would be inconsistent with that allocation of responsibility to permit Dr. Duncan to avoid a fine completely in light of his failure to take reasonable steps to determine whether the necessary steps that would authorize his practice of psychology had been taken.

Accordingly, the fine will be reduced to \$100.00 because Dr. Duncan's non-compliance with the statute was inadvertent, because no harm occurred as the result of his violation, and because he took prompt corrective action.

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<sup>6</sup> This should not be interpreted as an endorsement of NCC's apparent failure to forward the appropriate information to the Board of Psychology. If a group home fails to take the necessary steps to ensure that persons providing psychological services to its residents are either licensed or in compliance with regulations authorizing unlicensed persons to practice psychology, the group home may be in violation of the law. *See* 42 C.F.R. § 483.430(b)(5).

**V. Order**

Based upon the foregoing findings of fact and conclusions of law, it is, this \_\_\_\_\_ day of \_\_\_\_\_, 2001:

**ORDERED**, that Respondent shall pay a total of **ONE HUNDRED DOLLARS (\$100.00)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715); and it is further

**ORDERED**, that, if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order. D.C. Code § 6-2713(i)(1), as amended by the Abatement and Condemnation of Nuisance Properties Omnibus Amendment Act of 2000, D.C. Law 13-281, effective April 27, 2001; and it is further

**ORDERED**, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Code § 6-2713(f), the placement of a lien on any property owned by Respondent that may be found in the District of Columbia pursuant to D.C. Code § 6-2713(i), and the sealing of Respondent's business premises or work sites pursuant to D.C. Code § 6-2703(b)(6).

/s/ **5/31/00**

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John P. Dean  
Administrative Judge